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HOUSE BILL 766

**48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007**

INTRODUCED BY

Andrew J. Barreras

AN ACT

RELATING TO CONSUMER PROTECTION; CLARIFYING THE APPLICABILITY OF THE UNFAIR PRACTICES ACT; CLARIFYING THE BASIS FOR A PRIVATE REMEDY; AMENDING SECTIONS OF THE UNFAIR PRACTICES ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 57-12-2 NMSA 1978 (being Laws 1967, Chapter 268, Section 2, as amended) is amended to read:

"57-12-2. DEFINITIONS.--As used in the Unfair Practices Act:

A. "person" means, where applicable, natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures or syndicates;

B. "seller-initiated telephone sale" means a sale, lease or rental of goods or services in which the seller or

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1 [his] the seller's representative solicits the sale by  
2 telephoning the prospective purchaser and in which the sale is  
3 consummated entirely by telephone or mail, but does not include  
4 a transaction:

5 (1) in which a person solicits a sale from a  
6 prospective purchaser who has previously made an authorized  
7 purchase from the seller's business; or

8 (2) in which the purchaser is accorded the  
9 right of rescission by the provisions of the federal Consumer  
10 Credit Protection Act, 15 U.S.C. 1635 or regulations issued  
11 pursuant thereto;

12 C. "trade" or "commerce" includes the advertising,  
13 offering for sale or distribution or purchasing of any services  
14 and any property and any other article, commodity or thing of  
15 value, including any trade or commerce directly or indirectly  
16 affecting the people of this state;

17 D. "unfair or deceptive trade practice" means an  
18 act specifically declared unlawful pursuant to the Unfair  
19 Practices Act, a false or misleading oral or written statement,  
20 visual description or other representation of any kind  
21 knowingly made in connection with the purchase, sale, lease,  
22 rental or loan of goods or services or in the extension of  
23 credit or in the collection of debts by a person in the regular  
24 course of [his] the person's occupation, vocation, trade or  
25 commerce, which may, tends to or does deceive or mislead any

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1 person and includes:

2 (1) representing goods or services as those of  
3 another when the goods or services are not the goods or  
4 services of another;

5 (2) causing confusion or misunderstanding as  
6 to the source, sponsorship, approval or certification of goods  
7 or services;

8 (3) causing confusion or misunderstanding as  
9 to affiliation, connection or association with or certification  
10 by another;

11 (4) using deceptive representations or  
12 designations of geographic origin in connection with goods or  
13 services;

14 (5) representing that goods or services have  
15 sponsorship, approval, characteristics, ingredients, uses,  
16 benefits or quantities that they do not have or that a person  
17 has a sponsorship, approval, status, affiliation or connection  
18 that [~~he~~] the person does not have;

19 (6) representing that goods are original or  
20 new if they are deteriorated, altered, reconditioned,  
21 reclaimed, used or secondhand;

22 (7) representing that goods or services are of  
23 a particular standard, quality or grade or that goods are of a  
24 particular style or model if they are of another;

25 (8) disparaging the goods, services or

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1 business of another by false or misleading representations;

2 (9) offering goods or services with intent not  
3 to supply them in the quantity requested by the prospective  
4 buyer to the extent of the stock available, unless the  
5 purchaser is purchasing for resale;

6 (10) offering goods or services with intent  
7 not to supply reasonable expectable public demand;

8 (11) making false or misleading statements of  
9 fact concerning the price of goods or services, the prices of  
10 competitors or one's own price at a past or future time or the  
11 reasons for, existence of or amounts of price reduction;

12 (12) making false or misleading statements of  
13 fact for the purpose of obtaining appointments for the  
14 demonstration, exhibition or other sales presentation of goods  
15 or services;

16 (13) packaging goods for sale in a container  
17 that bears a trademark or trade name identified with goods  
18 formerly packaged in the container, without authorization,  
19 unless the container is labeled or marked to disclaim a  
20 connection between the contents and the trademark or trade  
21 name;

22 (14) using exaggeration, innuendo or ambiguity  
23 as to a material fact or failing to state a material fact if  
24 doing so deceives or tends to deceive;

25 (15) stating that a transaction involves

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1 rights, remedies or obligations that it does not involve;

2 (16) stating that services, replacements or  
3 repairs are needed if they are not needed; [~~or~~]

4 (17) [~~failure~~] failing to deliver the quality  
5 or quantity of goods or services contracted for; [~~and~~] or

6 (18) using deceptive representations or  
7 designations of geographic origin of goods or services; and

8 E. "unconscionable trade practice" means an act or  
9 practice in connection with the purchase, sale, lease, rental  
10 or loan, or in connection with the offering for purchase, sale,  
11 lease, rental or loan, of any goods or services, including  
12 services provided by licensed professionals, or in the  
13 extension of credit or in the collection of debts [~~which~~] that  
14 to a person's detriment:

15 (1) takes advantage of the lack of knowledge,  
16 ability, experience or capacity of a person to a grossly unfair  
17 degree; or

18 (2) results in a gross disparity between the  
19 value received by a person and the price paid."

20 Section 2. Section 57-12-10 NMSA 1978 (being Laws 1967,  
21 Chapter 268, Section 8, as amended) is amended to read:

22 "57-12-10. PRIVATE REMEDIES.--

23 A. A person likely to be damaged by an unfair or  
24 deceptive trade practice or by an unconscionable trade practice  
25 of another may be granted an injunction against it under the

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1 principles of equity and on terms that the court considers  
2 reasonable. Proof of competition between the parties, actual  
3 confusion, monetary damage, loss of profits or intent to  
4 deceive or take unfair advantage of [~~any~~] a person is not  
5 required. Relief granted for the copying of an article shall  
6 be limited as to the prevention of confusion or  
7 misunderstanding as to source.

8 B. Any person who suffers [~~any~~] loss of money or  
9 property, real or personal, as a result of [~~any~~] employment by  
10 another person of a method, act or practice declared unlawful  
11 by the Unfair Practices Act may bring an action to recover  
12 actual damages or the sum of one hundred dollars (\$100),  
13 whichever is greater. Where the trier of fact finds that the  
14 party charged with an unfair or deceptive trade practice or an  
15 unconscionable trade practice has willfully engaged in the  
16 trade practice, the court may award up to three times actual  
17 damages or three hundred dollars (\$300), whichever is greater,  
18 to the party complaining of the practice.

19 C. The court shall award attorney fees and costs to  
20 the party complaining of an unfair or deceptive trade practice  
21 or unconscionable trade practice if the party prevails. The  
22 court shall award attorney fees and costs to the party charged  
23 with an unfair or deceptive trade practice or an unconscionable  
24 trade practice if it finds that the party complaining of such  
25 trade practice brought an action that was groundless.

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1           D. The relief provided in this section is in  
2 addition to remedies otherwise available against the same  
3 conduct under the common law or other statutes of this state.

4           E. In [~~any~~] a class action filed under this  
5 section, the court may award damages to the named plaintiffs as  
6 provided in Subsection B of this section and may award members  
7 of the class such actual damages as were suffered by each  
8 member of the class as a result of the unlawful method, act or  
9 practice.

10           F. A party to a court action for a private remedy  
11 pursuant to this section may request in writing during the  
12 thirty-day period following service of the summons and  
13 complaint on all parties named in the action that the parties  
14 attempt to settle the claim in early mediation. If a request  
15 for mediation is made, the parties shall choose a mutually  
16 acceptable mediator and enter into mediation within sixty days  
17 of the appointment of an acceptable mediator unless otherwise  
18 agreed by the parties. A request for mediation may be  
19 rescinded at any time if agreed to by all parties.

20           G. If the parties do not agree on a mutually  
21 acceptable mediator, the court shall appoint the mediator. If  
22 the early mediation pursuant to this section is entered into  
23 within sixty days following the appointment of the mediator,  
24 the parties suing on the basis of unfair, deceptive or  
25 unconscionable trade practices or acts under the Unfair

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1 Practices Act shall be required to pay no more than fifty  
2 dollars (\$50.00) toward the cost of the mediation and the other  
3 party shall pay the remainder of such cost, unless otherwise  
4 agreed by the parties. If a person is seeking injunctive  
5 relief in accordance with Subsection A of this section, the  
6 person may pursue the claim for injunctive relief without  
7 following the mediation requirements of this subsection and  
8 Subsection F of this section."

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